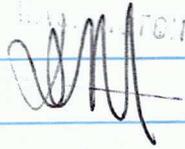


Court of Appeals  
of the State of Washington  
Division Two

COURT OF APPEALS  
2020 JUN 15 PM 1:06

STATE OF WASHINGTON  
FILED  


State of Washington,  
Respondent

No. 54069-0-11

v.

Statement of Additional  
Grounds For Review

Nicolas Clark,  
Appellant

RAP 10.10

I, Nicolas Clark, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

### Additional Ground 1

I was denied my Sixth Amendment right to face my accuser. The Tumblr employee that acted as the informant is in essence my accuser. Hearsay is defined as a statement that is made outside of the courtroom by a person who does not appear at the trial or pretrial hearing and that is introduced to prove the truth of the matter asserted in the statement. As a general rule, hearsay statements are inadmissible. In this case it was not just hearsay, but double hearsay that was used.

It is unfair to present damaging statements against the accused without providing the defendant the opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004).

## Additional Ground 2

The privilege against self incrimination and my Sixth Amendment rights were denied. While being detained, after refusing to give a statement and asking for an attorney but before miranda rights were given, it was suggested by the officer holding me that if I were more cooperative and helpful things would go easier for me. Giving my password to my phone and computer would be considered very helpful. It was because of the officer's statements that I gave my passwords. Interrogation refers not only to express questioning but also includes any words or actions on the part of the police that the police should know are likely to elicit an incriminating response from the suspect. The privilege against self-incrimination and Sixth Amendment rights are protected by miranda. As we know from the case of the Boston Bomber, I-phones cannot be accessed without the password, not even by law enforcement. My password was unknown by anyone but myself. The evidence obtained is pursuant to the fruit of a statement that is coerced in violation of the Fifth Amendment. If the statements leading to the physical evidence were involuntary or coerced, as opposed to simply unwarned, the evidence would need to be excluded at trial. Citing *Chavez v. Martinez*, 538 U.S. 760, 769 (2003). "Those subject to coercive

police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial."

### Additional Ground 3

The issuing magistrate of the search warrant was not neutral and detached in her find of probable cause. "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done... so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law." U.S. Supreme Court: *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 1294, 157 L. Ed. 2d 1068, 1083, 2004 U.S. LEXIS 1624, 25 (2004). It is possible that Judge Clark, the issuing magistrate, abandoned her neutral and detached role when finding probable cause in the affidavit to issue the search warrant. Judge Clark has the highest rate of recusal of all the judges in Clark County when sitting on a case involving a sexual offense. There would be no reason to file for a different judge in any case unless you believe that the judge assigned to the case could not or would not be neutral and detached, or is overly harsh in those types of cases. If ~~she~~ was found to just be overly harsh, she might also be too quick to sign a search warrant without objectively reviewing the affidavit for probable cause. This error can be cured by de novo review, without giving deference to the issuing magistrate.

## Additional Ground 4

Misleading and false statements in Detective Nolan's Affidavit were necessary to the magistrate's finding of probable cause. Detective Nolan's Affidavit states that "the female is being directed to pose for the camera" and "the child's legs are separated making the focal point of the picture the vaginal area." I argue that the focal point of any picture involving a single person would be that person's face, whether they are clothed or unclothed. The act of separating one's legs does not make the focal point the pubic region. Not only this but the statement is vague. Detective Nolan does not indicate that there are arrows pointing to the vaginal area nor does he state that the area is highlighted or circled in some fashion. Are her legs slightly separated or are they spread wide open. That would be relevant in establishing whether the picture was provocative and might establish that the picture was taken for use in sexual gratification and that the focal point is the "vaginal area." There is nothing to indicate that the focal point is the female's vagina or that the picture was taken for sexual gratification. Under *Franks v. Delaware*, supra, a warrant is invalid if the affidavit upon which it is based contains a false statement deliberately or recklessly included, or is meant to mislead, that was necessary to the magistrate's finding of probable cause. "To allow a magistrate to be misled in such a manner would denude the probable cause requirement of all meaning." *United States v. Starnert*, 762 F.2d 775, 780-81 (9th Cir. 1985). We must deter the conduct of adding misleading and false statements in an affidavit given by a police officer. In addition, there is nothing to support Detective Nolan's assertion that the female is pre-pubescent.

There are many women over the age of 18 that appear much younger; i.e. a youthful appearance, lacking of breasts and shaved or otherwise rid of pubic hairs. This goes to the additional vagueness of Detective Nolan's affidavit. This would be easily avoided in the future by attaching the photo in question to the affidavit when applying for the search warrant, which was not done in this case.

### Additional Ground 5

The independent source doctrine does not apply to this case. The Supreme Court opinion in *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N. E. 2d 949 states, "Once the cell phone is in police custody, the state has satisfied the immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone is neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents." (Emphasis added) The Supreme Court finally addressed the issue of cell phones seized as part of a search incident to arrest, holding that the officers must secure a warrant before conducting a search of a cell phone. In this case, the phone was searched prior to having a valid search warrant.

### Additional Ground 6

The trial court erred in finding me guilty of witness tampering. Asking my wife to look up a law should not be considered witness tampering. I was not aware of the name of the law at the time,

but I have since learned that the name of the law I wanted my wife to look up is called the Adverse spousal-testimony privilege. In addition, prosecution was wrong in her statement and threat that my wife would be arrested and lose our children if she did not testify. Prosecution used my wife's ignorance of the law in order to intimidate and force my wife into testifying at trial. The adverse spousal-testimony privilege says that the spouse of a defendant may not be forced to or kept from testifying in a criminal trial. If the appellate court does not agree that this court be dismissed due to prosecutorial misconduct then it should dismiss it as fruit of the poisonous tree when it finds the warrant devoid of probable cause and thus unlawful.

### Additional Ground 7

My criminal history score was not calculated correctly. The Sentencing Reform Act of 1981 states that "Judges select an offender's sentence within a standard sentence range provided in statute, which is calculated based on the statutorily designated seriousness level for the offense and the offender's criminal history score based on the offender's past convictions." (Emphasis added) It does not mention adding the criminal history score of the current conviction to the score of the past convictions. In addition, Rule 32(h) requires the sentencing judge to give reasonable notice to the parties if he intends to depart from the guidelines range.

## Additional Ground 8

My right to a jury trial that increase penalties was denied. The trial judge erred when he added the "free crime" aggravator at sentencing that increased my sentence without a jury and without notice or the possibility for any defense against that aggravator. The right to jury trial on facts that increase penalties (Apprendi Error), could lead to a vacated sentence. Beginning with Apprendi, 530 U.S. at 481 and continued in Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court has imposed constitutional limitations on the sentencing authority of judges. The Supreme Court has also applied the rule in Apprendi to Washington's State's sentencing scheme. The trial judge erred when issuing a sentence beyond the prescribed statutory maximum.

June 10, 2020

Nicholas A. Clark